



IT IS SO ORDERED.
Signed May 29, 2014

A handwritten signature in cursive script, reading "Arthur S. Weissbrodt".

Arthur S. Weissbrodt
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re]	Case No. 13-53893-ASW
]	
MI PUEBLO SAN JOSE, INC.,]	Chapter 11
]	
Debtor.]	
]	
In re]	Case No. 13-53894-ASW
]	
CHA CHA ENTERPRISES, LLC,]	Chapter 11
]	
Debtor.]	
]	

MEMORANDUM DECISION RE: MOTIONS FOR STAY PENDING APPEAL

Before the Court are the motions of NUCP Turlock, Inc. ("NUCP") for a stay pending appeal filed in each of the above referenced cases. NUCP is represented by attorneys Peter J. Benvenutti and Tobias S. Keller. The motions are opposed by Debtor Mi Pueblo, Inc., which is represented by attorney Robert Harris; Debtor Cha Cha Enterprises, LLC, which is represented by attorney Paul Pascuzzi; Victory Park Capital Advisors, LLC and Victory Park Management, LLC (collectively, "Victory Park"), which are represented by attorney Todd Schwartz; Juvenal Chavez, who is represented by attorney Henry B. Niles, III; and The Official

1 Committee of Unsecured Creditors of Mi Pueblo San Jose, Inc. (the
2 "Committee"), which is represented by attorney Eric Goldberg.

3 NUCP, which is an unsecured creditor with filed claims in each
4 case in excess of \$11 million,¹ has appealed this Court's orders
5 confirming each of Debtors' plans of reorganization, and seeks what
6 NUCP characterizes as a "limited stay" of those orders.

7 Specifically, NUCP seeks a stay of the provisions of the
8 confirmation orders that approve and implement releases of claims
9 by either Debtor against Juvenal Chavez, members of the Chavez
10 family, and the Chavez family trust, to the extent necessary to
11 enable unsecured creditors to realize the benefit of any such
12 claims that might be pursued following a reversal of the
13 confirmation order(s).

14 A motion for a stay pending appeal is analyzed under
15 essentially the same standard as that used for injunctive relief:
16 (1) a likelihood of success on the merits; (2) whether appellant
17 will be irreparably injured absent a stay; (3) whether the issuance
18 of a stay will substantially injure other parties to the
19 proceeding; and (4) the public interest. Hilton v. Braunskill, 481
20 U.S. 770, 776-77 (1987); In re Wymer, 5 B.R. 802, 806 (9th Cir. BAP
21 1980). In the Ninth Circuit, courts are to analyze these factors
22 on a "sliding scale," so that a stronger showing of one element may
23 offset a weaker showing of another. A stay may be appropriate
24 where serious questions going to the merits are raised and the
25 balance of hardships tips sharply in movant's favor. Alliance for
26 the Wild Rockies v. Cottrell, 632 F.3d 1127, 1131 (9th Cir. 2011).
27 The Bankruptcy Appellate Panel for the Ninth Circuit has observed

28 _____
¹Debtors have filed objections to NUCP's claims in both cases.

1 that, although the power to issue a stay pending appeal should be
2 exercised when any irreparable injury may result from the effect
3 of the order on appeal, that power "should be sparingly employed
4 and reserved for the exceptional situation." Wymer, 802 B.R. at
5 806 (citations omitted).

6 As a threshold matter, the Court finds that the limited stay
7 sought by NUCP is not permitted under either general contract
8 principles or the Bankruptcy Code. The plans of reorganization are
9 contracts containing carefully negotiated, mutually dependent
10 provisions. The release provisions were required by Victory Park
11 as a condition to providing exit financing to fund the plans.
12 Under similar circumstances, other bankruptcy courts have refused
13 to permit a partial stay. E.g., In re Convenience USA, Inc., 290
14 B.R. 558 (Bankr. M.D.N.C. 2003); In re Yellowstone Mountain Club,
15 LLC, 2009 WL 2163528 (Bankr. D. Mont. Jul. 16, 2009).

16 In Convenience USA, the bankruptcy court denied a partial stay
17 of a confirmation order staying only provisions for assumption and
18 assignment of certain leases. The court reasoned that a partial
19 stay would effectively

20 modify the plan of reorganization that was submitted to
21 creditors and other parties in interest, who voted to
22 approve the plan submitted to them, and not a plan
23 subsequently tailored to suit a disgruntled appellant.
24 Such an anomalous result is totally inconsistent with the
25 disclosure requirements under § 1125 of the Bankruptcy
26 Code and the rights of creditors, pursuant to § 1126, to
27 vote on the plan disclosed to them.

28 290 B.R. at 561. Such is the case here. The Debtors' plans of
reorganization are complex and contain numerous interrelated
provisions. The debtor releases are an essential component of the
consideration for the exit financing, and NUCP Turlock admits that

1 it has found no cases whatsoever to support the notion that a
2 bankruptcy court may grant a partial stay in this situation.

3 NUCP cites In re Thorpe Insulation Co., 677 F.3d 869 (9th Cir.
4 2012). However, Thorpe Insulation is distinguishable. In that
5 case, the Ninth Circuit Court of Appeals considered the question of
6 equitable mootness in the context of an appeal of a confirmation
7 order. The Court of Appeals held that the appeal was not equitably
8 moot, despite the fact that the plan had been substantially
9 consummated, because, under the facts of that case, the bankruptcy
10 court could fashion some relief if the order were reversed. Id. at
11 883. The Court of Appeals did not have before it the question of
12 the propriety of granting a partial stay of a confirmation order
13 pending appeal.

14 Even if this Court could grant a partial stay pending appeal,
15 for the reasons explained below, NUCP has not met its burden to
16 show that any stay is appropriate.

17
18 **1. Likelihood of Success on the Merits**

19 NUCP argues that there are serious questions going to the
20 merits of its appeal. Specifically, NUCP challenges this Court's
21 findings that the Plans were proposed in good faith and the Court's
22 overruling of NUCP's evidentiary objections. NUCP also contends
23 that the expedited nature of the confirmation hearing deprived NUCP
24 of a reasonable opportunity to develop and present its objections.
25 The Court's good faith finding will be reviewed under a clearly
26 erroneous standard, meaning that if there is any evidence to
27 support the finding, the appellate court must affirm. Here, the
28 Court's finding was based on the extensive and essentially

1 uncontradicted evidence before the Court that the plans were
2 negotiated at arms' length and after extensive marketing efforts.
3 In the context of the disclosure statement hearing, NUCP questioned
4 whether the Chavez family had engaged in self-dealing in the
5 management of the Debtors, but offered no proof to that effect.
6 However, the Creditors' Committee provided evidence that it had
7 engaged in its own substantial investigation into these matters and
8 discovered nothing that warranted the Committee's withdrawal of
9 support for the plans. At the confirmation hearing, the Court
10 permitted NUCP to cross-examine Mr. Chavez, albeit on a limited
11 basis, but that cross-examination revealed nothing that raised
12 questions as to whether the Plans were proposed in good faith.

13 Further, as noted by this Court at the confirmation hearing,
14 NUCP has been litigating with Mi Pueblo for some time dating back
15 to well before these bankruptcy cases were filed. NUCP could have,
16 but did not, raise issues and/or take discovery relating to alleged
17 conflicts and/or lack of good faith at any time during these
18 bankruptcies - and certainly as of the time of Debtor's motion for
19 approval of DIP and exit financing in early March 2014.

20
21 **2. Relative Hardships**

22 The Court finds that a stay pending appeal of the confirmation
23 orders would cause irreparable harm to the Reorganized Debtors.
24 Debtor Mi Pueblo is required to post a \$3.5 million workers'
25 compensation bond by June 1, 2014. According to the declaration of
26 John Zott, Chief Financial Officer of Mi Pueblo, Mi Pueblo will not
27 have sufficient cash to post the bond without the exit financing
28 provided for in the plan, and without workers' compensation

1 insurance, Mi Pueblo will be forced to cease operations.
2 Collectively, Debtors employ approximately 2,700 people across
3 California. Absent the exit financing, Mi Pueblo's 21 grocery
4 stores, which cater to the area's underserved Hispanic population,
5 would be forced to close, and those 2,700 employees would be put
6 out of work. The liquidation of Mi Pueblo would likely be
7 devastating to Cha Cha as well, given that Mi Pueblo is Cha Cha's
8 primary source of income.

9 It is important to note that NUCP does not seek a stay of the
10 entire confirmation orders. Indeed, NUCP concedes that a stay of
11 the entirety of the confirmation orders is neither feasible nor
12 realistic given "the dynamics and financial needs of an operating
13 business, and of the reliance that numerous parties . . . are going
14 to place on the reorganized entity." Nevertheless, NUCP argues
15 that if a "limited stay" is not granted, NUCP's appeal rights may
16 be rendered moot by the substantial consummation of the plan.
17 However, as illustrated by the analysis in Thorpe Insulation,
18 appellate courts may well not find equitable mootness where there
19 is effective relief that can be fashioned if a confirmation order
20 is reversed, even where the plan has been substantially
21 consummated. See Thorpe Insulation, 677 F.3d at 883 (suggesting
22 examples of relief that could be fashioned upon reversal, including
23 return of funds, modification of plan, replacing management).

24 25 **3. Public Interest**

26 NUCP argues that the public interest weighs in favor of a stay
27 because NUCP's appeal should be decided on the merits, and the good
28 faith requirement is a critical part of plan confirmation and

1 central to preserving the integrity of the bankruptcy process. The
2 Court agrees that these are important considerations, but, as noted
3 above, a finding of equitable mootness is not necessarily a
4 certainty, and the public interest would not be served by forcing
5 Debtors into a liquidation.

6 For the foregoing reasons, the motions for stay pending appeal
7 are denied. Counsel for each Debtor may submit a proposed form of
8 order in each of their respective cases.

9 *****END OF MEMORANDUM DECISION*****

COURT SERVICE LIST

All parties are ECF participants.